DEPARTMENT OF PROPERTY.

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HOLLIS *v.* BROWN.[1] SUPREME COURT OF PENNSYLVANIA.

Lease—Warranty as to Condition of House.

Where one leases a house and lot of ground for a term of years, there is no implied warranty on the part of the lessor, that the house is habitable, and fit to dwell in, even though the situation of the house is such that it could not be used for anything else than a dwelling house; and an affidavit of defence to an action for rent, which makes only this defence, is insufficient.

IMPLIED WARRANTIES IN A LEASE. HABITABLE CONDITION. DWELLING HOUSE.

The above case finally settles the law in Pennsylvania on the question involved, if, indeed, it had not been practically settled by previous decisions, see *infra*. Habitable condition is not implied in the lease of a dwelling house. A. may rent a house from B. for five years, and the day after find it uninhabitable by reason of its faulty construction, yet A. has to pay the rent for the term. The rule *caveat emptor* applies. There is no escape, because there is no implied warranty that the house was habitable. This is in accordance with the previous trend of decisions in the State: See Wheeler *v.* Crawford, 86 Pa. 327. The opinion of Judge WOODWARD, in Carson *v.* Godley, 26 Pa. 117; Moore *v.* Weber, 71 Pa. 429, page 432; Barns *v.* Wilson, 1 Crum. (Pa.) 303; Hazlett *v.* Powell, 6 Casey, 297. As we shall see, is in accordance with the general drift of authority in the United States. It is not, however, on the exact point involved, as the law of England. We will first trace the English authorities on the subject.

As long ago as 1811, Lord MANSFIELD decided the case of Baker *v.* Holtpzaffell, 4 Taunt, 44. This was an action for rent. The premises in question had been let for one year. Shortly after the first quarter's rent had been paid, the house was burnt down. It was held that the tenant had to pay the rent for the remainder of the term. The ground, on which Lord MANSFIELD put the decision, was one peculiar to the common law. The civil law

[1] 157 Pa.

would have looked at the lease as a contract. Doing so, the question would be necessarily decided in favor of the tenant. He had leased a particular thing, *i. e.*, a house, and the house, the subject matter of the contract, had disappeared. The contract was necessarily terminated. But Lord MANSFIELD advanced at the question from the standpoint of the English law of real property. What was rented was not the house but the land. "The land," he says, "is still in existence, and there was no offer on the part of the defendant to deliver it up. The landlord could not enter to rebuild." While Judge HEATH adds, on this last point, "the defendant might have rebuilt at any period of the term, whereas the landlord would have been a trespasser, if he entered for that purpose." This was good logic from the point of view taken, but the absurdity of telling the tenant, who was liable to be turned out within a twelfth month, that because he could build a new house for the benefit of his landlord and, therefore, must pay rent, is evident. It is said by Justice HEATH that the case had often been decided before at *nisi prius*, though this is the first reported decision. The defendant evidently knew his case was hopeless, for he had appealed for relief to Lord ELDON (Holtpzaffell *v.* Baker, 18 Ves. 116). But unlike the life tenant in possession, the lessee is not a favorite with the Chancellor, so the bill was dismissed.

The law of this country, unlike the English law, except where altered by statute as in Ohio and Illinois, has followed this leading case.

After all, there is something to be said for the common law rule. The burning of the house is the fault of neither party to the contract. It is as fair that it should fall on the tenant as on the landlord. Had equity interfered, it might have divided the loss, requiring the tenant to pay half the rent.

As we have said, the decision in this first English case is undoubtedly still law on the point involved both in England and America. Where, however, the premises become uninhabitable, through a defect existing at the time of the lease, the English decisions cannot be made to agree with the reasoning of Lord MANSFIELD or with the Pennsylvania case.

In 1825, the case of Edwards *v.* Etherington, Ry. & Moody, 11, 268, came up for decision. It appeared that the walls of the house, for rent of which the action was brought, were in a dilapidated condition. The defendant, who had occupied the house as tenant from year to year, finding that the house was unsafe, left it. The landlord did not accept a release for some time. The question involved was whether the landlord could demand rent from the time the defendant had quitted the premises to the date when he had finally agreed to accept them from the tenant. Lord Chief Justice ABBOTT charged the jury that it was for them to say whether such serious reasons for quitting existed in the case, as would exempt the defendant from the demand on the ground of his having no *beneficial use and occupation* of the premises; and that, through no fault of his own, but through the fault of the plaintiff, who ought to have taken care that the premises should

have been in such a state as to continue useful to the defendant, the house became unfit for use. The verdict was for the defendant.

From the first of the report of this case, there is no way in which it can be reconciled with the principle enunciated in Baker *v.* Holtpzaffell, Lord Chief Justice ABBOTT seems to advance towards the question from an entirely different standpoint than that taken by Lord MANSFIELD. He looks at the lease as he would at a contract for goods and chattels, and asks whether there has been any *beneficial* use and enjoyment by the tenant. In his mind, the beneficial use and enjoyment was the essence of the contract. In Lord MANSFIELD'S mind, the question seems to have been simple whether the tenant had been given control of a certain portion of the earth's surface, the fact that the lease really contemplated the occupation of a house being left out of consideration.

The next case, that of Collins *v.* Barrow (1831), 1 M. & R. 112, departs, if anything, still farther from the case of Baker *v.* Holtpzaffell. There the defendant took the house, the rent of which was in question, under a written agreement by which he was to occupy for three years and to keep the premises in a tenantable condition. He had, in fact, quited the premises without notice at the expiration of the first six months. The defendant said that the house was unfit for habitation for want of sufficient drainage, whereby it became unwholesome, noisome and offensive. Baron BAILEY, in his decision remarked: "I do not see that the fact of the tenancy in this case, being under a written agreement, is material. In any case, the tenant is bound to pay rent during the time for which he has contracted, unless he satisfies the jury that, under the circumstances, he was justified in quitting. I think, however, that in point of law he will be freed from his obligation to reside on the premises, if he makes out, to the satisfaction of the jury, that the premises were noxious and unwholesome to reside in, and that this state arose from no default or neglect of his own, but from something over which he had no control, except at an extravagant and unreasonable expense." The house in this case was practically uninhabitable until a sewer was built, and the court held that the tenant was not bound to build a sewer, and if the landlord did not build it, the tenant could move out and terminate the lease. In the subsequent case of Arden *v.* Pullen, 10 M. & W. 321, it is intimated that the report of the case of Collins *v.* Barrow is not complete, and that it is possible there existed an express stipulation on the part of the landlord that he would build a sewer. From the whole opinion, however, of Baron BAILEY, it is evident that this express stipulation was not necessary for his decision. He took the point of view, which had been taken by Lord Chief Justice ABBOTT, and which was the point of view of the civil and not of the common law. Had the rest of the English judges advanced at the question from the same standpoint, they would have soon expressly overruled the earlier decision in Taunton, but Lord ABINGER, in the later case of Arden *v.* Pullen, 10 M. & W. 321, returned to the common law rule.

The declaration in that case stated that on the 25th of March, 1839, by an agreement made between the plaintiff and defendant, the plaintiff agreed to let, and the defendant agreed to take of the plaintiff, for the term of three years, from the 25th of December, 1839, a house and premises at the yearly rent of thirty pounds, payable quarterly, and the defendant, among other things, agreed with the plaintiff that he, the defendant, would keep the said premises in as good repair and condition as the same then were, and would so leave the same on the termination of the said lease, fair wear and tear excepted. The breach set out was that the defendant had not paid the two quarter's rent, which became due on the 25th of March, 1842. The excuse of the defendants in their plea was that the said house and premises, by means and in consequence of age and natural decay, and the badness of the material thereof, and the bad and improper manner, in which they were originally built, and the rotten foundrous miry and unsafe state and condition of the walls, timbers and foundations thereof, and for want of good and sufficient sewerage and drainage, etc., that the premises were in a ruinous, bad, and unsafe and dangerous condition and wholly unfit and unsafe for habitation, and that the defendant had requested the plaintiff to put the house in good condition, and he refused. Counsel for the defence argued that the case of Collins *v.* Barrow was in point, as it undoubtedly was. Lord ABINGER, however, took the position that, unless there was some fraud or improper concealment on the part of the plaintiff, the contract for letting the house was perfectly good, and implied no warranty that the premises were in a good condition; that the landlord, under the lease, had only one obligation to perform, to wit: not to disturb the quiet possession of the tenant during the term. The allegation in the plea, he asserted, would not be good, had it not contained the assertion that the defects in the house arose through the fault of the plaintiff. As this allegation could not be proved by the defendant, the real question was, whether, when a house turns out to be uninhabitable, the landlord is bound to repair it. "I think," says Lord ABINGER, "that without some express stipulations he is under no such obligation."

Baron ALDERSON was of the same view in his opinion, he cites the case of Izon *v.* Gorton, 5 Bing. N. C. 501 (1839). The case follows Baker *v.* Holtpzaffell, the circumstances presenting exactly the same question, the premises for the rent of which the suit was brought having been consumed by fire. The peculiar circumstances of this last suit, however, bring out very forcibly the absurdity of the English reason, for the Lord MANSFIELD had decided the case before him on the ground that the landlord could not enter to repair without being a trespasser, and that the only person who had a power to repair was the tenant. In Izon *v.* Gorton the tenant occupied two upper stories in a house. The landlord actually did enter and repair. A man who rents so many square feet of air space fifty feet in the air, enclosed by four walls of a room, is obliged to pay rent for the space when the house is consumed by fire, and a

baloon is the only method by which he can reach his peculiar portion of the atmosphere, and this all because Lord MANSFIELD refused to look at the lease as a contract for the use of a particular thing, which it really was, and insisted upon regarding it as creating a temporary estate or interest in a portion of the surface of the earth.

In justice to our courts, however, it is fair to say that with us where the leased premises consist of a room in the building, and the building is entirely destroyed by fire or otherwise, the tenant is discharged from his obligation to pay rent: Stockwell *v.* Hunter, 11 Met. (Mass.) 448; Graves *v.* Berdan, 26 N. Y. 498; Pollock on Contracts, 363 *et seq.*

Other English cases following Arden *v.* Pullen are Gott *v.* Gandy, 2 E. & B. 845; Keates *v.* Earl Cadogan, 10 C. B. 591.

The English Courts, which seem to be abandoning the position of Lord MANSFIELD in 1825 and 1830, return to it again in 1839 and 1840. In 1843, however, the same Lord ABBINGER, who had decided the case of Arden *v.* Pullen in 1842, entirely abandoned his position in his decision in the celebrated case of Smith *v.* Marrable, 11 M. & W. 5. (But see Hart *v.* Windsor, 12 M. & W. 68). This case, on which the peculiar English law on this subject is largely based, was an action for rent brought to recover a balance of five weeks rent of a furnished house at Brighton, which had been rented by the defendant of plaintiff under the following conditions: "Mr. John Smith, of 24 St. James Street, agrees to let, and Sir Thomas MARRABLE agrees to take, the house No. 5 Brunswick Place, at the rent of eight guineas per week, for five or six weeks, at the option of the said Thomas MARRABLE." Under this agreement, the defendant and his family entered into possession of the house. On the following day, Lady MARRABLE complained to the plaintiff that the house was infested with bugs, and he sent a person in to take means for getting rid of them. This means, however, did not prove successful, and at the end of the first week Lady MARRABLE removed from the premises and returned the key to the plaintiff. There was no stipulation in the contract that the house should be habitable. The fact that it was a furnished house was evidence that it was to be used as a dwelling house. Baron PARKE cites, with approval, the cases of Edward *v.* Etherington and Collins *v.* Barrow, while Lord ABBINGER, who had distinctly overruled those cases in Ardon *v.* Pullen, asserts here that he is "glad that authorities have been found to support the view which I took at the trial," and even adds that, for his own part, no authorities are wanted, as its common sense alone enables him to decide. The inconsistency of these two opinions was such that it soon became necessary for the learned judge to attempt to draw some distinction between them. This he did in the case of Sutton *v.* Temple, 12 M. & W. 52 (1843). In this case the rent of a meadow was in question. The plaintiff refused to pay the rent, because the meadow turned out to be unfit for the pasturage of cattle. It is not clear, from the report of the case, whether the tenant could have used the premises in any other way than as a pasturage. In his decision, in

favor of the plaintiff, Lord ABBINGER says: "If this case involved the necessity of overruling the case of Smith *v.* Marrable, I should hesitate long before I should acquiesce in so doing so, for I entirely approve of the decision which we came to in that case." He then sets out the ground of distinction. The first case is the letting of a house and furniture Being for both house and furniture, it must be meant for occupation. The furniture must be fit for use, *i. e.*, so must the house. But he assumes that the tenant in the case before him could only use the land as a pasturage. He admits that the land could not be used for pasturage, but it is not the landlord's fault, he has no knowledge that his field is in a bad condition and will poison cattle which are put upon it. Therefore, he cannot be held responsible. For our own part, we cannot follow this logic. It seems to us that there is no evidence that the plaintiff in Smith *v.* Marrable knew that his premises were infested with bugs or that they were so infested from any fault of his. Why then should that case rest on a different principle than that of Sutton *v.* Temple? Where is the real distinction?

Following the trend of the decision in Sutton *v.* Temple, BACON, B. C., in Powell *v.* Chester, 52 L. T. Rep. 722, said that the principle of the decision in Smith *v.* Marrable should be confined to where a person rents a house for a month or two at the seashore. In that limitation, however, there is no reason.

We believe that the English courts will sooner or later overrule one case or the other and adopt a consistent principle. The case of Wilson *v.* Hatton, 2 L. R. (Ex Div.) 336 (1877), would seem to indicate that there would ultimately be embodied in the English law of the obligations of the tenant under a lease to pay rent the principles of the civil law. This last case, as the case of Smith *v.* Marrable, was the rent of a furnished house. When the tenant moved in she found that the drains were in such a condition that the house was not reasonably fit for habitation. KELLY, C. B., said, in his opinion, permitting the defence, "we have allowed some argument to be addressed to us by counsel for the defendant, not because we entertained any real doubt upon the question raised in this case, but because of the general importance of the points involved, and because of the comments which had been made at various times on the law as laid down in the case of Smith *v.* Marrable." The attitude of the learned judge is totally different from that taken by Lord MANSFIELD in 1811. To his mind the contract is for a house, and not, as with Lord MANSFIELD for a piece of land which may happen to have a house on it. All through the opinion, we see the question of what the parties to the lease intended rather than how should we decide the case as a technical question of real property. The only case cited, as a case in point, is that of Tully *v.* Howling, 2 Q. B. D. 182, which was a case of admiralty law on an agreement to charter a ship. The other judges who decided the case advance at the question from the same standpoint. That this standpoint reaches results which are entirely irreconcilable with the American law and the position of Lord MANSFIELD in Baker *v.* Holtpzaffell will soon

become apparent to the English Bench. To hold a man liable to pay rent if the house burns down, but to discharge him from the obligation if it happens to be infested with bugs, is absurd. The American law which holds a tenant liable under all circumstances, except where there has been fraud or misrepresentation on the part of the landlord, has at least the advantage of being perfectly clear and logically consistent. The position of the American courts has also this practical advantage, in spite of its apparent unfairness to the tenant, and the absurdity of its conclusion when we look at the real intention of the parties to the lease of a house. So many tenants, who have not inserted the fire clause in their lease, have been obliged to pay rent for a burnt ruin, that the law on the subject is well known throughout the States. Being well known, the parties put what they really intend in black and white, and in doing so, tend to lessen litigation. If every time, for instance, that a tenant thought his house was uninhabitable, he could move out and leave it to a jury to say whether his action was reasonable, there would be endless suits on the subject, and we would go over our experience in the law of negligence, where it has taken thousands of cases to enable us to get any more definite statement of the law than that a man should exercise *reasonable* care. It is sometimes questionable, and it may be here, whether justice to be obtained in each particular case by a jury is as advantageous as having definite rules of law, which may, until they are generally known, work substantial injustice. Take the very principle that the tenant has to pay for his premises burnt or not, can any attorney point to a lease which has come under his notice which does not provide for the contingency of the premises being destroyed by an act of God.

The following are the principal American cases on the subject:

Massachusetts.—Here there is no implied warranty in the rent of a dwelling house that the house shall be habitable during the terms: Bowne *v.* Hunking, 135 Mass. 380; Foster *v.* Peyser, 9 Cush. (Mass.) 242; Welles *v.* Castles, 3 Gray (Mass.), 323.

Nor that a store rented as a warehouse for dry goods shall be suitable for that purpose: Dutton *v.* Gerrish, 9 Cush. (Mass.) 89.

New York.—The Massachusetts rule on this question is adopted in New York: Gillis *v.* Morrison, 22 N. B. 207.

New Jersey.—Naumberg *v.* Young, 44 N. J. L. 331, 345. See remarks of DEPUE, J.

Of course, when a house is rented generally, with no circumstances which indicate that it must be used for a dwelling house only, there is no question that the landlord does not warrant it suitable for any particular purpose: Howard *v.* Doolittle, 3 Duer (N. Y.), 464. See remarks of DUER, J., on page 274; Jaffe *v.* Harteau, 56 N. Y. 398; Cleves *v.* Willoughby, 7 Hill (N. Y.), 83, per BARDSLEY, J.; Scott *v.* Simons, 54 N. H. 426; Loupe *v.* Wood, 51 Cal. 586; Royce *v.* Guggenheim, 106 Mass. 201-202, per GRAY, J.; Robbins *v.* Mount, 4 Robt. 553; O'Brien *v.* Capwell, 59 Barb. (N. Y.) 497; Edwards *v.* N. Y. H. R. R. Co., 98 N. Y. 245-247, EARLE, J., and in Minnesota the courts have gone so far as to say that, where the lessor stated

in reply to the question of the lessee, that the sewer connected with the premises was in a good condition if he did not know the assertion to be false, he would not be liable to repair the drainage, though the sewer was entirely out of order. This, however, is not law in Pennsylvania: See Wolfe *v.* Arrott, 109 Pa. 473.

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DALTON *v.* WEST END STREET RAILWAY CO.[1] SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Compromise of Suit by Attorney.

A compromise of a pending suit by an attorney, in violation of express instructions from his client, will not bind the latter; and when the parties can be placed in *statu quo*, and application is seasonably made, the Court has power to vacate any judgment founded on such compromise, and to order it and the compromise stricken from the files.

POWER OF ATTORNEY TO BIND CLIENT BY COMPROMISE OR SETTLEMENT.

By the very fact of his employment, an attorney-at-law acquires complete control of the action, in so far as the management and direction thereof, and the remedy sought, are concerned; and he has an implied authority to do any acts, or take any steps, which merely relate to the conduct of the suit, or the remedy; but he cannot take any measures, or enter into any agreement, which tends to affect the *right of action*, without some express additional authority from the client. Davis *v.* Hall, 90 Mo. 659; S. C., 3 S. W. Rep. 382. By virtue of this implied authority, he may waive the client's right of trial by jury by an agreement to refer the case to arbitrators: Thomas *v.* Hews, 2 C. & M. 327; Buckland *v.* Conway, 16 Mass. 396; Jenkins *v.* Gillespie, 10 Sm. & M. (Miss.) 31; Holker *v.* Parker, 7 Cranch, 436; Morris *v.* Grier, 76 N. C. 410; Bingham *v.* Guthrie, 7 Harris (Pa.), 418; Sargeant *v.* Clark, 108 Pa. 588. May withdraw a juror: Swinfen *v.* Ld. Chelmsford, 5 H. & N. 890; Strauss *v.* Francis, 1 L. R. Q. B. 379.

[1] Reported in 34 N. E. Rep. 261.